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No. 00-753

In the Supreme Court of the United States

CARMELO JOSE RODRIGUEZ, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that, under 8 U.S.C. 1252(a)(2)(C) (Supp. V 1999), it lacked jurisdiction on direct petition for review over petitioner's challenge to his final removal order, but that the district court had habeas corpus jurisdiction to entertain that challenge under 28 U.S.C. 2241.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 206 F.3d 308. The decisions of the Board of Immigration Appeals (Pet. App. 40a-42a) and the immigration judge (Pet. App. 37a-39a) are unreported. The decision of the district court on habeas corpus proceedings, rejecting petitioner's claim on the merits (Pet. App. 46a-58a), is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 2000. A petition for rehearing was denied on June 9, 2000 (Pet. App. 43a-45a). On August 29, 2000, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including October 7, 2000. On September 27, 2000, Justice Souter further

extended the time within which to file a petition for a writ of certiorari to and including November 6, 2000, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves amendments to the Immigration and Nationality Act (INA) enacted by Congress in 1996. Those changes were designed in large part to reduce the opportunities for criminal aliens to obtain administrative relief from deportation, and to facilitate their removal from the United States by restricting and streamlining the process of judicial review of their deportation orders. Two enactments by Congress are particularly pertinent: the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (enacted Apr. 24, 1996); and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (enacted Sept. 30, 1996).

a. An alien is deportable from the United States if he has been convicted at any time after his admission of two or more crimes involving moral turpitude not arising out a single scheme of criminal misconduct (see 8 U.S.C. 1227(a)(2)(A)(ii) (Supp. V 1999)), if he has been convicted of an "aggravated felony," as that term is defined in the INA (see 8 U.S.C. 1227(a)(2)(A)(iii) (Supp. V 1999); 8 U.S.C. 1101(a)(43)(G) (1994 & Supp. V 1999)), or if he has been convicted of an offense involving controlled substances (see 8 U.S.C. 1227(a)(2)(B)(i) (Supp. V 1999)). Before the enactment of AEDPA, an alien lawfully admitted for permanent residence who was subject to deportation because of a criminal conviction could apply to the Attorney General for discretionary relief from deportation under 8 U.S.C.

1182(c) (1994). To be eligible for such relief, the alien had to show, among other things, that he had had a lawful unrelinquished domicile in this country for seven years, and that, if his conviction was for an aggravated felony, he had not served a term of imprisonment of five years or more. See 8 U.S.C. 1182(c) (1994).

If the Attorney General denied relief from deportation under Section 1182(c), then the alien could challenge that denial of relief by filing a petition for review of his deportation order in the court of appeals. See 8 U.S.C. 1105a(a) (1994) (incorporating Hobbs Administrative Orders Review Act (Hobbs Act), 28 U.S.C. 2341-2351 (1994 & Supp. IV 1998)). Under certain circumstances an alien in custody pursuant to an order of deportation could seek judicial review thereof by filing a petition for a writ of habeas corpus in district court, pursuant to 8 U.S.C. 1105a(a)(10) (1994).

b. In 1996, Congress twice restricted both the substantive eligibility of criminal aliens for discretionary relief from deportation and the availability of judicial review of criminal aliens' deportation orders. First, on April 24, 1996, Congress enacted AEDPA into law. Section 440(d) of AEDPA amended Section 1182(c) to make certain classes of criminal aliens categorically ineligible for discretionary relief from deportation under that Section, including aliens convicted of two unrelated crimes involving moral turpitude, aggravated felonies, and controlled substance offenses. See AEDPA § 440(d), 110 Stat. 1277 (referring toaliens deportable under 8 U.S.C. 1251(a)(2)(A)(ii), 1251(a)(2)(A)(iii), and 1251(a)(2)(B) (1994) (now recodified as 8 U.S.C. 1227(a)(2)(A)(ii), 1227(a)(2)(A)(iii), and 1227(a)(2)(B) (Supp. V 1999)).

Section 440(a) of AEDPA enacted a related exception to the general availability of judicial review of deporta-

tion orders in the courts of appeals for the same classes of aliens. Section 440(a) provided that any final order of deportation against an alien who was deportable for having committed one of the disqualifying offenses enumerated in Section 440(d) "shall not be subject to review by any court." AEDPA § 440(a), 110 Stat. 1276-1277. At the same time, Section 401(e) of AEDPA, entitled "ELIMINATION OF CUSTODY REVIEW BY HABEAS CORPUS," repealed the previous version of 8 U.S.C. 1105a(a)(10) (1994), which had specifically permitted aliens in custody pursuant to an order of deportation to seek habeas corpus relief in district court. See AEDPA § 401(e), 110 Stat. 1268.

c. On September 30, 1996, Congress enacted IIRIRA into law. In Section 304 of IIRIRA, Congress abolished the old distinction between "deportation" and "exclusion" orders, and instituted a new form of proceeding, known as "removal." See 8 U.S.C. 1229, 1229a (Supp. V 1999); IIRIRA § 304, 110 Stat. 3009-587 to 3009-593. Section 304 of IIRIRA also refashioned the terms on which an alien found to be subject to removal may apply for relief in the discretion of the Attorney General. Congress completely repealed old Section 1182(c). See IIRIRA § 304(b), 110 Stat. 3009-597 ("Section 212(c) (8 U.S.C. 1182(c)) is repealed."). In its stead, Congress created a new form of discretionary relief, known as cancellation of removal, with new eligibility terms. See 8 U.S.C. 1229b (Supp. V 1999); IIRIRA § 304(a)(3), 110 Stat. 3009-594. An alien convicted of any aggravated felony is ineligible for discretionary cancellation of removal. See 8 U.S.C. 1229b(a)(3) (Supp. V 1999).

Because IIRIRA made sweeping changes to the system for removal of aliens, Congress delayed IIRIRA's full effective date and established various transition

rules. As a general matter, Congress provided that most of IIRIRA's provisions, including the new removal procedures, the new provisions for cancellation of removal, and the repeal of Section 1182(c)—all of which were enacted together in Section 304 of IIRIRA —would take effect on April 1, 1997. See IIRIRA § 309(a), 110 Stat. 3009-625. For aliens who were placed in deportation or exclusion proceedings before that date, Congress provided that most of IIRIRA's amendments would not apply, and that such cases instead would generally be governed by pre-IIRIRA law, including AEDPA, along with transitional rules further restricting judicial review of criminal aliens' deportation orders. See IIRIRA § 309(c), 110 Stat. 3009-625 to 3009-627, as amended by Act of Oct. 11, 1996, Pub. L. No. 104-302, § 2, 110 Stat. 3657 (technical corrections).

Congress also recast and streamlined the INA's provisions for judicial review of removal orders, in Section 306 of IIRIRA. For removal proceedings commenced after April 1, 1997, Congress repealed altogether the former judicial-review provisions of 8 U.S.C. 1105a (1994), which, before AEDPA, had (at subsection (a)(10)) expressly made the writ of habeas corpus available to aliens held in custody. IIRIRA § 306(b), 110 Stat. 3009-612. Congress replaced those judicial review provisions with the new 8 U.S.C. 1252 (Supp. V 1999), which reestablished the traditional rule that final orders of removal are subject to judicial review only on petition for review in the courts of appeals. See 8 U.S.C. 1252(a)(1) (Supp. V 1999) (incorporating Hobbs Act). Congress also restricted judicial review of removal orders entered against criminal aliens by providing that, "[n]otwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is

removable by reason of having committed" various criminal offenses, including aggravated felonies, controlled substance offenses, and two unrelated crimes involving moral turpitude. See 8 U.S.C. 1252(a)(2)(C) (Supp. V 1999). And Congress enacted a new, sweeping jurisdiction-limiting provision, 8 U.S.C. 1252(b)(9) (Supp. V 1999), which provides:

> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section [*i.e.*, Section 1252].

2. Petitioner is a native and citizen of the Dominican Republic who was admitted to the United States as a lawful permanent resident alien on December 20, 1983. Certified Administrative Record (C.A.R.) 17. On February 19, 1993, petitioner pleaded guilty in New Jersey state court to possession of a controlled substance (cocaine) and receiving stolen property, and was sentenced to four years' imprisonment. C.A.R. 69, 82-83. On March 28, 1994, he pleaded guilty in Ohio state court to receiving stolen property, and was sentenced to six months' imprisonment. C.A.R. 75-81.

On July 1, 1997, after the general effective date of IIRIRA, petitioner was served with a Notice to Appear which charged him with removability based on those convictions. The Notice charged that petitioner had been convicted of two unrelated crimes involving moral turpitude (the two convictions for receiving stolen property), an aggravated felony (the New Jersey con-

viction for receiving stolen property),[1] and a controlled substance offense. At his removal hearing before an immigration judge (IJ), petitioner admitted the allegations in the Notice to Appear, and conceded his removability as charged. Petitioner sought, however, to apply for discretionary relief from deportation under former 8 U.S.C. 1182(c) (1994), which had been repealed by IIRIRA. The immigration judge ruled that petitioner was ineligible for relief under Section 1182(c), and ordered him deported to the Dominican Republic. C.A.R. 54-55.

The Board of Immigration Appeals (BIA) dismissed petitioner's appeal. Pet. App. 41a-42a. The BIA concluded that relief under former Section 1182(c) was not available to petitioner because he was placed in removal proceedings after IIRIRA's effective date, when Section 1182(c) was repealed. The BIA also ruled that petitioner was ineligible for cancellation of removal because of his conviction for an aggravated felony. *Id.* at 42a.

3. Petitioner filed a petition for review of his final removal order in the court of appeals. Petitioner did not contest that he was an alien who was removable as a result of his criminal convictions. Rather, he argued that the BIA erred in concluding that he was ineligible for relief under former Section 1182(c), and that IIRIRA's repeal of that provision should not be applied

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[1] The definition of "aggravated felony" in the INA includes "a theft offense (including receipt of stolen property) * * * for which the term of imprisonment [is] at least one year." 8 U.S.C. 1101(a)(43)(G) (1994 & Supp. V 1999). Petitioner was sentenced to four years' imprisonment for the New Jersey offense of receiving stolen property. C.A.R. 69.

to his case, which involved a criminal conviction entered before IIRIRA became effective. Pet. C.A. Br. 26-59.

The government moved to dismiss the petition for review for lack of jurisdiction, contending that, under Section 1252(a)(2)(C), the court of appeals was precluded from reviewing the claim raised by petitioner, who was convicted of offenses enumerated in that Section. Gov't C.A. Br. 3-4. The government also argued (*id.* at 11-15) that the district court also would not have authority to entertain petitioner's challenge to his final removal order under its habeas corpus jurisdiction provided by 28 U.S.C. 2241. The government argued that the court of appeals' earlier decision in *Sandoval* v. *Reno*, 166 F.3d 225 (3d Cir. 1999), which had held that district courts retained their authority after AEDPA to entertain criminal aliens' challenges to their final deportation orders, was distinguishable because that case involved only AEDPA and the transitional judicial-review provisions of IIRIRA, and not the permanent provisions of IIRIRA.

The court of appeals dismissed the petition for review for lack of jurisdiction, but also held that the district court (in which petitioner filed a petition for a writ of habeas corpus, see p. 10, *infra*), could entertain at least some of petitioner's challenges to his removal order under 28 U.S.C. 2241. Pet. App. 1a-33a. Closely following its earlier decision in *Sandoval* (see *id.* at 20a-22a), the court concluded that Congress had not, in IIRIRA, expressly repealed the district court's authority to entertain challenges to removal orders under 28 U.S.C. 2241. The court stressed that "a repeal of habeas jurisdiction will not be found by implication" (Pet. App. 20a), and that such a repeal "can only be effected by express congressional command" (*id.* at 21a). Nor did the court find its decision in *Sandoval*

undermined by either the permanent rules of IIRIRA, including Section 1252(b)(9)—which, it concluded, does not "expressly revoke[] habeas jurisdiction" (*id.* at 20a) —or this Court's intervening decision in *Reno* v. *American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 482 (1999), which described Section 1252(b)(9) as an "unmistakable 'zipper' clause" channeling review of all issues arising out of removal orders into the courts of appeals on direct review. Although the court agreed with the government that Section 1252(b)(9) "clearly expresses congressional intent that judicial review of questions arising from a proceeding brought to remove an alien be conducted under the INA in the courts of appeals," it did not agree that that Section "clearly expresses congressional intent that the district courts be divested of their habeas jurisdiction under § 2241." Pet. App. 24a.

The court also observed that its decision in *Sandoval* was predicated heavily on concerns that an unconstitutional suspension of habeas corpus would arise if criminal aliens such as petitioner were not able to invoke the district court's jurisdiction under 28 U.S.C. 2241 to challenge the merits of their removal orders. Pet. App. 28a-29a. The government had argued that the Constitution did not require a judicial forum for the particular claims raised by petitioner in this case, concerning eligibility for discretionary relief from deportation, and that on petition for review, the court of appeals could decide jurisdictional facts on which the statutory preclusion of review turned, including whether petitioner was an alien and whether he had in fact been convicted of an offense referred to in the categories enumerated in Section 1252(a)(2)(C). Gov't C.A. Br. 19-23. The government also suggested that, to the extent the Constitution did require a judicial forum

for petitioner's particular claims, it would be more consistent with congressional intent for that claim to be reviewed in the court of appeals on petition for direct review than in the district court on collateral challenge. See Pet. App. 30a. The court of appeals concluded, however, that Section 1252(a)(2)(C) broadly precluded it from reviewing the particular claims raised in this case by petitioner, and thus found this case no different from *Sandoval*. *Id.* at 29a-33a. The court noted, however, that "were the judges' preferences determinative, it is likely that many would opt for a system under which aliens' challenges to nondiscretionary immigration decisions, both statutory as well as constitutional, would be reviewed directly in the courts of appeals" rather than the district court on collateral challenge. *Id.* at 33a.

4. While his petition for review was pending in the court of appeals, petitioner filed a separate petition for a writ of habeas corpus in district court raising essentially the same challenges to his removal order. After the court of appeals' decision was issued, the district court ruled that it had habeas corpus jurisdiction under Section 2241 to consider petitioner's constitutional and statutory challenges to his removal order. Pet. App. 50a-52a. The district court also ruled, however, that the BIA had correctly concluded that petitioner was ineligible for relief under former Section 1182(c) because that provision was repealed when IIRIRA's permanent provisions went into effect, and it dismissed the habeas corpus petition on the merits. *Id.* at 53a-58a. Petitioner's appeal from that decision is still pending in the court of appeals. *Rodriguez* v. *Reno*, No. 00-2225 (3d Cir.).

DISCUSSION

Petitioner urges this Court to grant review to decide whether, after the comprehensive changes to the INA made by AEDPA and IIRIRA, a court of appeals on petition for review may entertain a claim such as that raised by petitioner in this case, notwithstanding the broad preclusion of review set forth in 8 U.S.C. 1252(a)(2)(C) (Supp. V 1999), and if not, whether the district courts retain authority under 28 U.S.C. 2241 to review a criminal alien's challenge to the merits of his final removal order. As petitioner points out, the courts of appeals have reached differing conclusions on those questions.

The Fifth Circuit, in *Max-George* v. *Reno*, 205 F.3d 194, 198-203 (2000), petition for cert. pending, No. 00-6280, and the Eleventh Circuit, in *Richardson* v. *Reno*, 180 F.3d 1311, 1318 (1999), cert. denied, 120 S. Ct. 1529 (2000), have ruled that Congress in IIRIRA has barred the district courts from entertaining a criminal alien's challenge to his final removal order. By contrast, in addition to the Third Circuit in the decision below, the First, Second, and Ninth Circuits have concluded that the district courts have such authority. See *Mahadeo* v. *Reno*, 226 F.3d 3, 7-14 (1st Cir. 2000) (holding that district court had habeas corpus jurisdiction under Section 2241 to consider retroactivity challenge), petition for cert. pending, No. 00-962; *St. Cyr* v. *INS*, 229 F.3d 406, 409-410 (2d Cir. 2000) (same), petition for cert. pending, No. 00-767; *Richards-Diaz* v. *Fasano*, No. 99-56530, 2000 WL 1715956 (9th Cir. Nov. 17, 2000) (same). The Second and Ninth Circuits have also held, in agreement with the court of appeals in this case, that Section 1252(a)(2)(C) broadly precludes the courts of appeals from entertaining challenges to final removal orders

raised by criminal aliens on direct petition for review, including challenges similar to that raised by petitioner in this case. See *Calcano-Martinez* v. *INS*, No. 98-4033, 2000 WL 1336611, at *9-*16 (2d Cir. Sept. 1, 2000) (holding that, under Section 1252(a)(2)(C), court of appeals lacked jurisdiction on direct petition for review to entertain similar retroactivity claim, but that district court had jurisdiction to entertain that claim on habeas corpus); *Flores-Miramontes* v. *INS*, 212 F.3d 1133, 1135-1136, 1141-1143 (9th Cir. 2000) (holding that, under Section 1252(a)(2)(C), court of appeals lacked jurisdiction to entertain aggravated felon's contention that his removal proceedings violated procedural due process, but that district court could entertain that claim on habeas corpus).

Because of that conflict in the circuits, as well as the importance of the issue to the administration of the INA, we have filed a petition for a writ of certiorari in *St. Cyr* seeking review of the Second Circuit's decision upholding the district court's assertion of jurisdiction under Section 2241 in that case.[2] In our view, *St. Cyr* is a better vehicle than this case for resolution of that jurisdictional issue. The government's petition in *St. Cyr* also seeks review of the Second Circuit's decision agreeing with the alien's challenge to the merits of the removal order in that case, which independently warrants plenary review in the event that the Court concludes in that case that jurisdiction in that case was proper under 28 U.S.C. 2241. See 00-767 (*St. Cyr*) Pet.

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[2] We are providing petitioner with a copy of our petition in *St. Cyr*. Related jurisdictional issues are also presented by the petitions in *Zalawadia* v. *Reno*, No. 00-268; *Obajuluwa* v. *Reno*, 00-523; *Reno* v. *Mahadeo*, No. 00-962; *Russell* v. *Reno*, No. 00-5970; and *Max-George* v. *Reno*, No. 00-6280.

at 26-30. This case, however, presents only the issue of jurisdiction, because the court of appeals held that it lacked jurisdiction over petitioner's petition for review and thus did not adjudicate the merits of petitioner's challenge to his removal order.

Petitioner points out (Pet. 8-9) that *St. Cyr* arises in a case in which the alien invoked the district court's habeas corpus jurisdiction, whereas this case arises on an alien's direct petition for review in the court of appeals. Petitioner does not disagree that the petition in *St. Cyr* warrants this Court's review, but he suggests that the Court should also grant review in this case, so that the Court may consider the jurisdictional issues raised by AEDPA and IIRIRA with both a habeas corpus case and a petition for review case before it. Petitioner observes (and we agree) that the Court will likely construe the preclusion-of-review provisions in IIRIRA in determining whether the district courts may exercise habeas corpus jurisdiction.

Although the Court could grant certiorari in this case as well as in *St. Cyr*, in our view it is not necessary for the Court to grant review in both cases. Every court of appeals that has considered the jurisdictional issues raised by AEDPA and IIRIRA has recognized that the scope of the court of appeals' jurisdiction on petition for review and the scope of the district court's habeas corpus jurisdiction after AEDPA and IIRIRA are closely intertwined issues. Indeed, the central basis for the court of appeals' decision in *St. Cyr* that jurisdiction was proper under 28 U.S.C. 2241 was its conclusion, based on its decision issued the same day in *Calcano*, *supra*, that under Section 1252(a)(2)(C) it lacked jurisdiction to entertain the same claim on direct petition for review. See *St. Cyr*, 229 F.3d at 409-410. Thus, if the Court grants certiorari in *St. Cyr*, when the Court

determines whether the lower courts properly exercised habeas corpus jurisdiction in that case, it almost surely will review the Second Circuit's conclusion that it could not have entertained the same claim on petition for review. Accordingly, we suggest that the Court hold the petition in this case for its disposition of *St. Cyr*.

CONCLUSION

The petition for a writ of certiorari should be held pending the disposition of the petition for a writ of certiorari in *INS* v. *St. Cyr*, No. 00-767, and then disposed of as appropriate in light the Court's action in that case.

Respectfully submitted.

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